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No. 87-1825

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v.

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the challenged modification to petitioner's approved plan of operation impair its property interests in its license, such that petitioner was entitled to due process under the Fourteenth Amendment?

2. Is the petitioner's challenge to the modification to its approved plan of operation moot?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent State of Wisconsin Department of Natural Resources (Department) respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Wisconsin Court of Appeals' decision in this case. That decision, which is

unreported, is reprinted in Petitioner's Appendix at App. 1-5.[1]

STATEMENT OF THE CASE

This case was initiated as an action seeking judicial review of a decision of the respondent under the Wisconsin Administrative Procedure Act, ch. 227, Wis. Stats. That decision, dated June 6, 1984, is a modification to the approved plan of operation for petitioner's "Muskego" landfill.

The plan modification in this case, issued pursuant to sec. 144.44(3)(d), Wis. Stats., is a review of ten reports submitted by Waste Management evaluating site performance and environmental conditions in the vicinity of the

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[1]Except as otherwise noted, all references to the appendix herein are to Petitioner's Appendix in the Petition for Writ of Certiorari.

landfill. App. 14-32. As a result of its review of these technical reports and its assessment of compliance with the existing plan of operation, the Department included five conditions and recommendations. App. 29-31. These conditions required: 1) submittal of the results of previously performed gas monitoring; 2) submittal of existing leachate head level[2] data; 3) correction of erroneous leachate elevation measurements; and 4) submittal of a report assessing groundwater flow patterns along the western perimeter of the site. A fifth provision recommends

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[2]"Leachate head level" is the elevation of leachate, toxic liquids that build up in the base of the landfill. Under the Muskego landfill's design, leachate must be collected and Waste Management must maintain specified leachate head levels to ensure that it does not leak out of the site and contaminate groundwater.

that Waste Management use analytical procedures with lower detection limits for certain contaminants.[3]

Prior to issuance of a decision in this case in either the trial court or court of appeals, the Wisconsin Supreme Court issued its decision in Waste Management of Wisconsin v. DNR, 128 Wis. 2d 59, 381 N.W.2d 318 (1986). In that case, the court specifically addressed the issues of: 1) what property interests in a plan of operation and license are created under secs. 144.44(3) and (4),

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[3]In its arguments before the Wisconsin courts, petitioner asserted that the plan modification also imposed other requirements. Its petition to this court contains a similar characterization. See Petition at 5 n.1. The factual characterization of the modification and its affect on the petitioner's license is pertinent to the determination of whether it impairs a property interest created under state law. The Wisconsin courts rejected petitioner's factual assertions.

Wis. Stats.; and 2) whether the procedures utilized by the Department satisfy due process requirements. The court specifically held that petitioner has no constitutionally protected interest in its plan approval, but that it does have a constitutionally protected property interest in its license to operate the facility. Thus, to the extent a plan approval modification affects an operator's interest in its license, due process protections are required. Id., 128 Wis. 2d at 65, 74-77, 381 N.W.2d at 321, 325-26. The court specifically stated, 128 Wis. 2d at 77, 381 N.W.2d at 326:

> [T]he license creates in Waste Management a legitimate claim of entitlement to operate the site free only from modification of the conditions regarding the construction of the site. We hold, therefore, that Waste Management's interest in its license to operate the Omega Hills site constitutes a

> property interest which merits due process protection to the extent that Waste Management is legitimately entitled to operate its Omega Hills site free from modification of the conditions of construction.

Having determined that due process protections attached to the specific plan modifications before the court in that case, the court further considered what process is due. The court balanced the competing interests of the parties and evaluated the procedures used by the Department, as reflected in the record. The court then concluded that the process employed by the Department met due process requirements. Id., 128 Wis. 2d at 65, 80, 381 N.W.2d at 321, 327-28.

The petitioner did not seek further review of the decision of the Wisconsin Supreme Court. That court's determination of what agency approval constitutes

a protected property interest under Wisconsin law is not before this court.

In the case at bar, the court of appeals applied the analysis mandated in Waste Management of Wisconsin v. DNR. The court examined the challenged plan modification to determine whether any of those requirements related to construction requirements which might affect petitioner's property interest in its license. The court concluded, notwithstanding petitioner's assertions to the contrary, "that the modifications made by the DNR did not relate to the conditions of construction." App. 4.

The court did not hold, as asserted in the Petition for Writ of Certiorari, that petitioner is not entitled to due process if its license is affected. Rather, it held that no property interest was affected in this case.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER HAS NOT ESTABLISHED JUSTIFICATION FOR GRANTING A WRIT OF CERTIORARI UNDER RULE 17, RULES OF THE SUPREME COURT.

Rule 17.1, Rules of the Supreme Court, sets forth the reasons for which this Court will consider granting a writ of certiorari. While it is not a comprehensive list, it does include two criteria pertinent to review of a state court decision: 1) when the state court has decided a federal question in a way which conflicts with federal court decisions; and 2) when the state court has decided an important issue of federal law which has not been but should be resolved by this Court. Neither circumstance is presented here.

A. Petitioner has not raised an important issue of federal law which requires consideration or resolution by this Court.

Petitioner characterizes the fundamental issue as whether a licensed business is entitled to procedural due process before its interest in its license is impaired by state action. That is not an issue which flows from the state court decision sought to be reviewed and is not before this Court. Indeed, that issue was conclusively resolved in Waste Management of Wisconsin v. DNR, wherein the Wisconsin Supreme Court held that a state solid waste facility license creates a property interest which is protected by the procedural safeguards of the Fourteenth Amendment.

Nor does this case raise the issue of whether petitioner has a protected

property interest in its approved plan of operation. In Waste Management of Wisconsin v. DNR, the state supreme court unequivocally held that a plan approval does not create a property interest, and that petitioner is entitled to due process only if a modification thereto affects its interest in its license. Waste Management did not seek review of that decision and may not collaterally attack it in this action. Montana v. United States, 440 U.S. 147, 155 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). Moreover, this court has long recognized that for state-created property interests, "their dimensions are defined" under state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The fundamental issue raised by this action is a factual issue, whether the

specific challenged plan modification in this case affects petitioner's interest in its license.[4] This Court has expressed its reluctance to be a "court for corrections of errors in fact finding." Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949); Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2623 (1987). Accordingly, there is no compelling reason to grant the requested writ to review this issue.

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[4]Petitioner asserts that it did not receive notice or an opportunity to be heard. Petition for Writ of Certiorari at 5. The decision sought to be reviewed herein never reached that issue, since it concluded that petitioner was not entitled to notice and hearing. In Waste Management of Wisconsin v. DNR, the state supreme court held that the procedures generally used by the respondent, coupled with subsequent judicial review, satisfied due process requirements.

B. This Court cannot take jurisdiction under 28 U.S.C. § 1257(3) to review the issue whether the requirement to expend money to conform with regulatory requirements constitutes a deprivation of protected property.

A secondary issue raised by petitioner is whether the requirement to expend money to comply with regulatory requirements constitutes a deprivation of property subject to Fourteenth Amendment protections. This Court does not have jurisdiction to resolve this issue, as it was not raised before the Wisconsin Court of Appeals.

The petitioner would invoke this Court's jurisdiction under the authority of 28 U.S.C. § 1257(3) (Petition at 2). Before this Court may assume jurisdiction over such a case, however, the record must indicate that the federal question

was raised in the court below and that the state court decided the federal claim. "If both of these do not appear on the record, the appellate jurisdiction fails." Crowell v. Randell, 10 Pet. 368, 392 (1836). See also City of Springfield, Mass. v. Kibbe, 107 S. Ct. 1114, 1115, reh. den., 107 S. Ct. 1966 (1987); Hill v. California, 401 U.S. 797, 805 (1971). Because the record shows that the petitioner did not raise this federal issue and it was not decided by the state court, the petition should be denied.

In its brief before the Wisconsin Court of Appeals, the petitioner described, as it was required to do by Rule 809.19(1)(b), Wis. Stats., both the issues and a table of contents of the arguments which it was presenting to that court for review. A verbatim listing of

the table of contents and eight issues identified by the petitioner is attached to this brief as Appendix 101. Nothing therein suggests that petitioner asserted an entitlement to due process based on the duty to expend money to meet regulatory requirements. Nor is that issue reflected in the decision of the court of appeals. On the contrary, the court of appeals understood the only constitutional issue to be whether the plan modification affected petitioner's interest in its license. App. 3-4.

Irrespective of the court's jurisdiction, resolution of this issue is not warranted. It is well established that alterations of regulatory requirements which impose additional costs and duties do not violate the due process clause. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 19-20

(1976). See also LeClair v. Swift, 76 F. Supp. 729, 733 (E.D. Wis. 1948); Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Public Service Comm., 260 Wis. 212, 227, 50 N.W.2d 416 (1951); Olson v. State Conservation Comm., 235 Wis. 473, 484, 293 N.W. 262 (1940).

C. The decision sought to be reviewed is consistent with prior decisions of this Court.

Petitioner asserts that the decision of the Wisconsin Court of Appeals conflicts with this Court's decision in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). This asserted conflict is premised upon petitioner's pervasive mischaracterization of the appellate court's ruling in this case.

In Loudermill, this Court ruled that a property interest created by state law

is not defined by the procedures that attach to a deprivation thereof. Id., 470 U.S. at 541. However, that case did not revise the long-standing principle that the existence of the property right is dependent upon and defined by state law. Id., 470 U.S. at 538. Rather, it only held that the procedures applicable to the deprivation of a property interest must meet the minimum requirements of the Fourteenth Amendment.

The decision in the case at bar does not deviate from or conflict with Loudermill, for it does not address the issue of what procedures apply to deprivation of one's interest in a solid waste facility license. Rather, it held that no property interest has been impaired, relying upon the unchallenged,

substantive test in Waste Management of Wisconsin v. DNR.[5]

Petitioner also asserts that the decision of the court of appeals conflicts with Ex Parte Young, 209 U.S. 123 (1908). Specifically, petitioner argues that the plan modification violates the due process clause because it subjects petitioner to potential license revocation and penalties without an opportunity to challenge the merits of the modification.

Ex Parte Young has no application here. In that case, the court held that a state may not require that one risk the imposition of severe penalties as the only means of challenging the applicable

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[5]The Wisconsin Supreme Court, in assessing the constitutionality of respondent's plan modification process, expressly relied upon Loudermill. Waste Management of Wisconsin v. DNR, 128 Wis. 2d at 80, 381 N.W.2d at 327.

law or agency action. This ruling was amplified shortly thereafter in Wadley Southern Ry. v. Georgia, 235 U.S. 651, 662 (1915), in which the court held that due process only requires an opportunity to test the validity of the state action before penalties are imposed. This Court has subsequently recognized that the opportunity for judicial review without risk of forfeitures precludes application of Ex Parte Young. See, e.g., Reisman v. Caplin, 375 U.S. 440, 446-47 (1964); St. Louis, I. Mt. & So. Ry. Co. v. Williams, 251 U.S. 63, 65 (1919). See also Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2nd Cir. 1975).

In the case at bar, petitioner is not subjected to prosecution for noncompliance as the sole means of challenging the plan modification. The

respondent's decision is immediately reviewable under the Wisconsin Administrative Procedure Act, ch. 227, Wis. Stats. Petitioner has a right to challenge any aspect of the plan modification, including its constitutionality. Sec. 227.57, Wis. Stats. In the event the petitioner fears enforcement by the agency during the pendency of the judicial review proceeding, it may seek a stay of enforcement. Sec. 227.54, Wis. Stats.

It is particularly ironic that petitioner asserts that it has had no opportunity to challenge the agency action prior to enforcement, as this action arose as an action for judicial review under ch. 227, Wis. Stats. Although petitioner chose to assert only procedural issues, it has had ample

opportunity to raise substantive challenges without risk of enforcement.

II. THIS ACTION IS MOOT.

This Court has consistently held that it will not consider a case which has become moot due to the passage of time, unless it is one which will necessarily evade review. Burke v. Barnes, 107 S. Ct. 734 (1987); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Securities & Exch. Com'n v. Medical Com. for Human Rights, 404 U.S. 403, 407 (1972).

The challenged plan modification in this case was issued nearly four years ago. The information which it solicited was required to be submitted within ninety days. There is nothing in the Petition for Writ of Certiorari or the record presented to this Court which

suggests that petitioner failed to comply or that the state sought to enforce the requirements contained therein.

The plan approval modification process employed by the respondent, although likely to recur, is not one which perpetually evades review. Many plan modifications impose conditions regulating long-term activities, which do not become moot over time. Indeed, the agency actions in Waste Management of Wisconsin v. DNR were live controversies not mooted over time. Accordingly, there is no justification to consider this moot case.

CONCLUSION

For the reasons stated herein, the respondent respectfully requests the Court to deny the writ of certiorari.

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QUESTIONS PRESENTED

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Answered by the trial court: No.

Question No. 2: Does the administrative record demonstrate that the Department of Natural Resources provided notice of its contemplated action in a manner sufficient to meet the requirements of due process under the 14th Amendment to the United States Constitution?

Not answered by the trial court.

Question No. 3: Does the administrative record demonstrate that the Department of Natural Resources provided a hearing to Waste Management sufficient to meet the minimum requirements of due process under the 14th

Amendment to the United States Constitution?

Not answered by the trial court.

Question No. 4: Do the contested case requirements of §§ 227.01, 227.07 and 227.14, Wis. Stats., apply to the final decision issued by the Department of Natural Resources?

Answered by the trial court: No.

Question No. 5: Did the Department of Natural Resources comply with the notice requirement of § 227.07(2), Wis. Stats.?

Answered by the trial court: Not applicable.

Question No. 6: Did the Department of Natural Resources comply with the hearing requirements of § 227.01 and § 227.07, Wis. Stats.?

Answered by the trial court: Not applicable.

Question No. 7: Was Waste Management entitled to a judgment in its favor setting aside and vacating or reversing and remand-

ing the modification based upon the Department of Natural Resources' violation of § 227.10, Wis. Stats.?

Answered by the trial court: No.

Question No. 8: As construed by the trial court, do the provisions of Chapter 144 and Chapter 227, Wis. Stats., deprive Waste Management of equal protection of the law?

Not answered by the trial court.